Commonwealth of Massachusetts
State Ethics Commission

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CONFLICT OF INTEREST OPINION
EC-COI-89-33

FACTS:

You are a member of the ABC Conservation Commission. You wish to know whether you may act on a filing made pursuant to G.L. c. 131, s.40 (the Wetlands Protection Act), where the filing involves property which is located "two lots away from [your] property, around the cul-de-sac, but not directly opposite the public way." The filing in question concerns the building of a residence and a permit for a subsurface sewage system involving a "coastal wetland."

You have been previously informed by this Commission that a financial interest is always presumed whenever a person owns property directly abutting the property in question and that the Commission has previously determined that a financial interest arises whenever a person is a so-called "party in interest," as defined by G.L. c. 40A, the Commonwealth's Zoning statute.[1]

You have now requested a formal opinion on whether you have any financial interest in the matter before the conservation commission because (i) the matter does not implicate the Zoning statute (and you are not, therefore, a statutorily defined "party in interest"), (ii) your property does not directly abut the property in question (thereby precluding the automatic presumption), and (iii) you are not a "person aggrieved" for purposes of the Wetlands Protection Act. You also seek guidance as to how the Wetlands Protection Act applies to your situation for s.19 purposes.

QUESTION:

Does a financial interest arise for s.19 purposes even if the matter does not implicate either (i) the "party in interest" test, (ii) the "automatic presumption" test, or (iii) the "person aggrieved" test?

ANSWER:

A financial interest is presumed in matters affecting real property where a party is (i) a direct abutter, (ii) a party in interest, or (iii) a person aggrieved. A financial interest may also be found even if no such rebuttable presumption arises, depending upon other factors in a even case. No presumptions arise in your case and we are aware of no such other factors to indicate a reasonably foreseeable financial interest.

DISCUSSION:

Section 19

Section 19 of the conflict of interest law prohibits a municipal employee[2] from partcipating[3] in a particular matter[4] in which to his knowledge he has a financial interest.

As a conservation commission member, you are a municipal employee for c. 268A purposes. Whether you have a "financial interest" in a particular matter depends on whether your interest can be quantified in monetary term.[5] This broad definition is limited, however, in at least two important ways.

First, a financial interest does not arise where the interest is one which "involves a determination of general policy and the interest of the municipal employee ... is shared with a substantial segment of the population of the municipality."[6] This exemption would apply, for example, where town selectmen must vote on a matter that would affect the collection of revenue from all town residents, including themselves.

Second, this Commission has determined that the s.19 financial interest test only applies to those interests which are either direct, or, if indirect, reasonably foreseeable. EC-COI-89-19.It is established Commission policy that s.19 will apply to every financial interest regardless of size and regardless of whether the interest affects the municipal employee favorably or adversely.[7] However, if the interest is not direct or reasonably foreseeable (that is if it is "remote~ speculative or not sufficiently identifiable"), s.19 will not prohibit participation. EC-COI-89-19 (municipal employee may participate in zoning matter where husband holds minor stock interest in a corporation affected by zoning change); 84-98; 84-96 (financial interest arises where municipal employee's land abuts and opposite to land to be developed). While a direct financial interest is usually obvious, whether a given financial interest is reasonably foreseeable must be determined on a case-by-case basis. The Commission will, among other things seeks guidance from other applicable statutes to assist in the determination of whether a financial interest is reasonably foreseeable in a given situation.

This Commission has previously determined that a financial interest will always be presumed in zoning matters where a property owner has property which directly abuts the property in question. See Public Enforcement letter 88-1; EC-COI-84-96. As with any legal presumption, individual facts and circumstances can be presented to rebut this presumption. To date, because Commission cases concerning financial interests in real property have always implicated some aspect of the zoning statute, the Commission has always looked to the zoning statute for guidance on s.19. This Commission has not yet had an opportunity to address directly how activities falling outside of 40A interact with s.19.

In EC-COI-84-96, however, the Commission stated that a financial interest could arise

even where a party is not a statutorily defined "party in interest" (as defined in the zoning statute) where one's property rights stand to be "significantly affected." Although the facts of that case implicated the statutory scheme of c. 40A, EC-COI-84-96 (and its definition of a "party in interest") need not be limited strictly to zoning applications.

Whether you would have a reasonably foreseeable financial interest in the matter in question depends, therefore, on what effects the proposed act or acts will have on your property. The Wetlands Protection Act recognizes those instances where a financial impact will be felt by property owners whose property is near the proposed activity. Consequently, regulations promulgated under the Wetlands Protection Act establish the "person aggrieved"[8] test which, in effect, is designed to vest certain rights in those persons, who would have an interest in the proposed activity, with a mechanism by which to act. The necessary implication of this test that "persons aggrieved" may financially suffer as a result of the activity in a way not likely felt by others. By its own terms, a "person aggrieved" is, therefore, unlike the person who might otherwise be eligible for a s.19 participation exemption[9] because the interest is different in either "kind" or "magnitude" from that of other property owners.

Accordingly, this Commission will presume that a reasonably foreseeable financial interest arises in connection with matters involving the Wetlands Protection Act where a party is a "person aggrieved" (as defined therein). Further, if any party could be considered a "party in interest" (that is, if the party is an abutter, an owner of land directly opposite on any public or private street, or an abutter to an abutter within three hundred feet of an activity affecting real estate), the Commission will also presume a financial interest regardless of whether the zoning statute or the Wetlands Protection Act is implicated, because of the likely significant affects of the proposed activity on a property owner.[10] Finally, a direct abutter will be presumed to have a financial interest in any matter affecting real estate, regardless of whether it implicates the zoning statute, the Wetlands Protection Act, or any other statutory scheme.

You have informed us that in the present matter, the wetlands filing concerns an application for "coastal" property as opposed to "inland" property. "Inland" property is regulated by the Wetlands Protection Act such that any activity which would likely increase flooding potential in the surrounding areas must meet specific guidelines to minimize the problem, that is, an applicant would need to provide "compensatory flood storage" such that his lot has no "net runoff." "Coastal" property, on the other hand, is not subject to these same guidelines. Presumably, no such coastal requirements exist because there is little or no increased potential for such flooding damage to any but a direct abutter, thereby eliminating the presumption that surrounding neighbors will suffer damage different in "magnitude" or "kind" from anyone else (insofar, at least, as to flooding damage).[11]

In any event, you have informed us that the matter in question has become moot because of the time constraints involved. You have also informed us that you did not participate in the matter while awaiting this opinion. We can inform you that no automatic presumption will arise in future matters based on similar facts because you

have represented to us that you are not (i) a direct abutter, (in) a "party in interest," or (iii) "a person aggrieved." Beyond that, however, a final etermination as to any financial interest you might have in a particular filing would require additional facts not presented here.[12]

DATE AUTHORIZED: December 21, 1989

[1] A party in interest, for purposes of c. 40A, includes "abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner."

[2] "Municipal employee," a person performing services for or holding an office, position, employment, or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meetmg and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution.

[3] “Participate,” participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

[4] "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

[5] See Graham v. McGrail, 370 Mass 133,139 (1976) (although the term "financial interest" is not defined in c. 268A, it is any interest "capable of evaluation in financial terms.")

[6] G.L c. 268A, s.19(b) (3).

[7] See, Public Enforcement Letter 88-1 (even participation in a way which is contrary to one's own financial interest is prohibited by s.19).

[8] A "person aggrieved," for purposes of the Wetlands Protection Act, means any person who may suffer an injury in fact which is different either in kind or maguitude from that suffered by the general public and which is within the scope of the Act. See 310 CMR 10.04.

[9] Because here the interest is not shared with a "substantial segment" of the municipal population.

[10] Wetlands protection is, in effect, a type of Zoning regulation. See, e.g., Golden v.

Board of Selectmen of Falmouth, 358 Mass. 519(1970).

[11] This would result in a municipal employee being able to rely upon the s.19(b)(3) exemption for certain coastal, as opposed to inland, filings.

[12] This Commission would consider, among other things, reasonably foreseeable increases or decreases in the value of your property, or upward or downward revisions in property tax assessments resulting from the filing in question. See, EC-COI- 84-96.